COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 5

ALEXANDER L. GUTERMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 18, 1960.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit filed on July 18, 1960, has not as yet been reported, and is printed in Appendix B hereto, *infra*, pages 56-75. The opinion of the United States Court of Appeals for the Second Circuit in *United States* v. *Guterma* (Docket No. 25790), filed November 20, 1959, is reported at 272 F. 2d 344. The opinions of the District Court for the Southern District of New York have not been reported, except for an opinion reported at 24 F.R.D.

134. The other opinions of the District Court are reprinted at pages 42a-46a of petitioner Guterma's Appendix in the Court of Appeals, copies of which are appended to this petition. The opinions of the District Court for the Eastern District of New York are reported at 173 F. Supp. 218, 174 F. Supp. 581, 179 F. Supp. 417, and 181 F. Supp. 195. The decision of Mr. Justice Harlan denying bail pending appeal is reported at 80 S. Ct. 666, 4 L. Ed. 2d 735.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on July 18, 1960, and is printed herein in Appendix B hereto, *infra*, pages 76-77. The jurisdiction of this Court is invoked under 28 United States Code 1254(1).

Questions Presented

1. Whether petitioner has been afforded due process of law, and whether the proceedings in the District Court and the prosecutorial function so far departed from the accepted and usual course of judicial proceedings and from the requirements of procedural due process as to call for an exercise of this Court's power of supervision where:

(a) In a Federal criminal prosecution for failing to file reports required by the Securities Exchange Act, and conspiracy to violate the reporting provisions of that statute, the District Court denied a motion to strike from the conspiracy count a paragraph which set forth as a purpose of the conspiracy the non-federal crimes of misappropriation, conversion, embezzlement and theft;

(b) After the denial of such motion, the prosecution offered and the trial court received, over objection, such extensive proofs as to such state crimes as to lead the jury to believe that misappropriation, embezzlement, and

corporate looting was the offense for which petitioner was on trial, and the trial court, in its charge to the jury, emphasized and presented to the jury as the issues for their determination whether petitioner was engaged in a scheme to loot and siphon off the assets of F. L. Jacobs Co. and to manipulate and rig its stock, whether petitioner had engaged in fiduciary self-dealing, and in a scheme of fraud and deception, in such a manner that such evidence and such portions of the charge provided the basis for the conviction of petitioner;

(c) Members of the staff of the Securities and Exchange Commission issued press releases and statements, and supplied newspapers, magazines, and radio and television stations with hostile and prejudicial material relating to petitioner, including confidential government files, which thoroughly discredited the reputation of petitioner and made it impossible for him to obtain a fair trial by an impartial jury in the New York metropolitan area, and the District Court denied petitioner's motion pursuant to Rule 21-a of the Federal Rules of Criminal Procedure for a change of venue;

(d) The trial court received into evidence documents and records which the District Court had directed the prosecution to make available to petitioner for discovery and inspection prior to trial, and which the prosecution did not make available until offered in evidence during the trial;

(e) The District Court denied a motion for a bill of particulars necessary to enable petitioner to prepare adequately for trial;

(f) The prosecution offered and the trial court received into evidence, over objection, charts and reports purporting to summarize the evidence, but which did not conform to the evidence, which did not fully and accurately state the facts, and which were based upon conjecture and speculation;

(g) The trial court denied a motion for judgment of acquittal as to Count 1 of the indictment, although there was no credible evidence on which a conviction on such count could be supported;

(h) Where the trial court included in its charge to the jury a summary of the evidence which was one-sided and argumentative, emphasizing evidence adduced by the prosecution unfavorable to petitioner, and omitting evidence favorable to the defense.

2. Whether Section 16(a) of the Securities Exchange Act—15 U.S.C. § 78p(a)—and Rule X-16 of the Securities and Exchange Commission are so vague and indefinite that they fail to establish an ascertainable standard of guilt.

3. Whether the requirement of Section 16(a) of the Securities Exchange Act requiring reports from the beneficial owner of ten per cent of an equity security registered on a national securities exchange is to be construed, in determining the ten per cent factor, so as to include only the shares outstanding, or all shares authorized to be registered, including those reserved for the conversion of preferred stock and the exercise of options.

4. What the meaning of "beneficial ownership" is under Section 16(a) of the Securities Exchange Act.

5. Whether the penal provisions of Section 32(a)—15 U.S.C. § 78ff(a)—of the Securities Exchange Act making a willful violation of the statute or the rules or regulations thereunder an offense are rendered void and unconstitutional by the clause therein providing that "* * * but no person shall be imprisoned under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation".

6. Whether the District Court erred in denying petitioner's request for a ruling that, upon his taking the

stand in his own defense, the scope of cross examination by the prosecution would be limited so as to preclude examination into the subject-matter of three other unrelated and untried indictments in which petitioner was named as a defendant.

7. Whether petitioner could properly have been convicted as an aider and abettor under Counts 10 through 20 in the absence of a showing that he was aware that the making of Form 4 reports by Comficor was required.

8. Whether the allowable unit of prosecution under the Securities Exchange Act is a course of conduct or each individual act, and whether the sentence imposed by the trial court is violative of the policy of lenity prescribed by this Court.

Constitutional Provisions, Statutes, Rules and Regulations Involved

The constitutional provisions, statutes, rules and regulations involved are listed below, and are printed in Appendix A, *infra*, pages 45-54.

Constitutional Provisions

Constitution of the United States

Amendment 5
Amendment 6

Statutes

Securities Exchange Act of 1934

Title 15, United States Code, Section 78m
Title 15, United States Code, Section 78p(a)
Title 15, United States Code, Section 78c(11) and (12)
Title 15, United States Code, Section 78t(e)
Title 15, United States Code, Section 78ff(a)
Title 15, United States Code, Section 78gg

Criminal Code

Title 18, United States Code, Section 2

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General Rules and Regulations Under the Securities Exchange Act

Rule X-3B-1
Rule X-13A-1
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Rule X-16A-2
Rule X-16A-3

Federal Rules of Criminal Procedure

Rule 7(d)
Rule 7(f)
Rule 16
Rule 21(a)

Statement of the Case

Petitioner, together with three corporations and another individual defendant, Robert J. Eveleigh, was named as a defendant in an indictment handed down March 16, 1959, by a grand jury in the Southern District of New York. Twenty counts thereof charged violations of the reporting requirements of the Securities Exchange Act (Title 15, United States Code, Sections 78p(a), 78ff(a), and 78t(c). A twenty-first count charged violation of the conspiracy statute (Title 18, United States Code, Section 371).

This prosecution initially stemmed from injunctive proceedings instituted by the Securities and Exchange Commission in the Southern District of New York. Such proceedings sought, to the accompaniment of a massive barrage of publicity, a mandatory injunction against peti-

tioner requiring the filing of various reports under the Securities Exchange Act. (*Securities and Exchange Commission* v. *Guterma*, Southern District of New York, Civil Action No. 143-53.) The Government did not succeed in obtaining such an injunction, the District Court commenting that its charges were founded upon "merely conjecture, suspicion, speculation, innuendo or even inferences".

The Regional Administrator of the SEC in New York on February 13, 1959, initiated these criminal proceedings by filing a complaint with the United States Commissioner. The complaint charged that petitioner, while an officer and director of F. L. Jacobs Co., had sold shares of common stock of such corporation belonging to him, which stock was registered on the New York Stock Exchange, and had failed to file reports of such sales with the Commission and the Exchange. He obtained a warrant for petitioner's arrest, claiming that he had information (subsequently proven false) that defendant had arranged to flee to Turkey with half a million dollars in cash, in a suitcase. On learning of the issuance of such warrant, petitioner voluntarily surrendered to the District Court the same day.

On the filing of such complaint and the issuance of such warrant, the SEC Regional Administrator informed the press, and placed with various metropolitan newspapers background stories of a highly inflammatory nature concerning petitioner, pledging the press to secrecy until petitioner was "apprehended". Weeks prior to this, two SEC attorneys had been sent to the *New York Times* with bundles of confidential files which they were told to make available to the press concerning petitioner, despite the prohibitions contained in the law and in the Commission's own rules against disclosure of such confidential information.

Thus, the Sunday edition of the *New York Times* of February 14, 1958, contained an inflammatory article con-

cerning petitioner commencing on page 1, and running for more than an entire page in the news section, in which petitioner was described as a financial wizard and mystery man, with references to Serge Rubenstein, operators of gambling rings, and other persons accused of crime, none of whom bore any relation to any of the charges then or thereafter made against petitioner. Similar stories more lurid in their format and headlines appeared in other metropolitan newspapers, and in radio and television comment.

Such articles referred to petitioner in headlines as a "takeover artist", as one through whom the American public had lost many millions of dollars, and as one who had been anti-American and pro-Japanese in World War II. His office was described as a "cesspool".

Such articles improperly and prejudicially suggested that he was linked with "the madame of a call girl establishment, operators of Las Vegas gambling casinos, a prominent New York lawyer now a fugitive in South America from a SEC warrant in another securities case, an Armenian moneylender operating through a Swiss trust, a Greek financier with a Panamanian holding company, Swiss bankers, an ex-investment banker who was involved in a stock deal with Serge Rubenstein before the draft-dodging financial finagler was murdered, high pressure stock peddling boiler shops, New York money lenders who charge interest as high as 2 per cent a month—24 per cent a year, the president of a small bank now under indictment for buying without board authorization $495,000 in notes of the F. L. Jacobs Co., the top company of the Guterma industrial-radio-tv movie empire".

Such stories continued unabated, many of them containing direct quotations from SEC staff members characterizing and commenting upon petitioners in an unfavorable manner.

The effect of such publicity was such as to cause *Time Magazine* to comment that petitioner was completely ruined and discredited before any determination by the courts.

A prompt preliminary examination on such complaint, as provided for in Rule 5 of the Federal Rules of Criminal Rules, was demanded, but, on the opposition of the Government, was denied petitioner by the United States Commissioner and the District Court. Thereafter, the complaint was superseded by the indictment herein, which abandoned the charge made in the complaint that petitioner had sold Jacobs shares without reporting them.

Petitioner then moved, pursuant to Rule 21a of the Criminal Rules, for a change of venue to the Western District of New York on the ground that he could not obtain a fair and impartial trial before an uncontaminated jury in the metropolitan area. This motion was denied by the District Court, with leave to renew it at the time of trial. A sampling of such newspaper articles was filed with the District Court in connection with such motion.

Thereafter, the SEC caused additional indictments to be filed against petitioner. An indictment of twenty-six counts charging violations of the mail fraud statute and the Federal Reserve Act was filed against petitioner in the Eastern District of New York. An additional indictment, charging further violations of the Securities Exchange Act, was filed in the Southern District of New York. And an indictment charging violation of the Foreign Agents Registration Act was filed in the District of Columbia. Each was accompanied by a repetition of the damaging publicity which the Government actively created concerning petitioner.

Publicity of this character continued right to the time of trial, including a feature article entitled "The Spoilers — The World of Alexander L. Guterma" in a national magazine of large circulation, which, without restraint,

repeated all of the reckless statements earlier disseminated by SEC staff members, and sought to depict petitioner as a corporation wrecker and thief.

The motion for a change of venue was renewed at the trial, and again denied by the trial court. Although various veniremen admitted that they had read newspaper articles relating to petitioner and so could not render a fair and impartial verdict, the Court of Appeals held that the motion for a change of venue was properly denied. (Transcript, pp. 41, 48, 51, 52, 53-4, 75, 119-120.) The Court of Appeals, while of the view that petitioner's argument might have had validity if the trial had occurred in the spring of 1959, held that the publicity had abated by the actual time of trial. It expressed the view that petitioner's argument would be more plausible if the charges against him had been rape or murder rather than violation of reporting requirements "or even the looting of a company".

At the commencement of the trial, petitioner requested a ruling that, in the event that he should take the stand, the scope of cross examination be limited so that the Government might not question him as to the subject matter of the three other indictments in which he was a defendant, so as to protect him against affording the Government a pre-trial examination and discovery in those other prosecutions. The trial court ruled that it could properly give such a ruling, and might even require the prosecution to submit its questions in writing in advance. At the conclusion of the Government's case, however, the trial court refused to give such a ruling, and said that if petitioner took the stand, the prosecution would be limited in cross examination only by the narrow restrictions laid down in *United States* v. *Provoo*, 215 F. 2d 531 (2nd Cir., 1954), a decision which had been extensively broadened thereafter by the Court of Appeals in *Tomaiolo* v. *United States*, 249 F. 2d 683 (2nd Cir., 1957).

Because of the ruling of the trial court that, on taking the stand, petitioner would be subjected to cross examination as to the unrelated facts in the other three cases in which he had been indicted, he did not take the stand. Such cross examination, although apparently permissible under *Provoo*, would certainly not have been permissible under *Tomaiolo*. Yet, the Court of Appeals held there was no error in denying such a ruling to petitioner.

The charges in the indictment related to the alleged failure to file reports required to be filed with the Securities and Exchange Commission and the New York Stock Exchange in connection with F. L. Jacobs Co., a corporation whose common stock was listed on the New York Stock Exchange, and of which petitioners were officers and directors.

Counts 1 and 2 of the indictment charged that during the months of December, 1958, and January, 1959, respectively, there were changes in the beneficial ownership of petitioner in Jacobs common stock, that reports of such changes in beneficial ownership were required to be made to the Commission and the Exchange by petitioner within ten days after the close of the month in which such changes in beneficial ownership occurred, and that petitioner wilfully and knowingly failed to file such reports. Petitioner was convicted on both counts, the trial court denying a motion for judgment of acquittal thereon. The conviction on Count 2 was reversed by the Court of Appeals.

Counts 3 and 4 made identical charges against defendant Eveleigh with respect to the same months. At the close of the Government's case, Count 4 against Eveleigh was dismissed with the consent of the Government. He was convicted on Count 3.

Count 10 of the indictment charged that during the month of December, 1957, the corporate defendant Comfecor, Inc., became the beneficial owner of more than 10%

of the common stock of Jacobs registered on the New York Stock Exchange, and was accordingly required to file an initial report as to its beneficial ownership in Jacobs common stock with the Commission and the Exchange, and wilfully and knowingly failed to do so. Counts 11 through 20 each charge that in each of ten separate months subsequent to November, 1957, there were changes in the beneficial ownership of Comficor of the Jacobs stock owned by it, and that reports of such changes in beneficial ownership were required to be made to the Commission and to the Exchange, and that there was willful and knowing failure so to do. In each of Counts 10 through 20 petitioner is charged as an aider and abettor (Title 18, United States Code, Section 2), along with defendant Eveleigh, although the prosecution presented no proofs that petitioner was aware that such reports were required or did anything resulting in their non-filing. Petitioner was convicted on all such counts.

Whether Comficor was required to file such reports with the Commission and the Exchange depended upon whether at any time it was the beneficial owner of more than ten per cent of the common stock of F. L. Jacobs Co. registered on the New York Stock Exchange. The prosecution contended that the number of shares registered was identical with the number of shares outstanding, which were 882,607. Yet the Commission's own Rule X-3B-1 included in such a category all shares for which authority to add to the list has been granted, and the Exchange had notified petitioner that the number of shares whose listing was authorized was 1,190,036. Thus, depending upon which interpretation was applicable, a crucial variance of 30,743 shares affected the determination as to whether the 10% requirement was or was not applicable. In connection with these counts, petitioner raised the question of whether the penal provisions contained in Section 32(a), 15 U.S.C. 78ff of the act are not void for uncertainty.

Petitioner also raised in the District Court and in the Court of Appeals questions as to the constitutionality of the

provisions of the Securities Exchange Act upon which all of the substantive counts were based. Such provisions had never before been invoked or been the subject of decision in either a criminal or a civil case. The District Court, in the motion part, held that "it would be improvident to dispose of the grave issues raised on a motion to dismiss", and directed that the questions be postponed until the development of the trial record. Such motion was accordingly renewed at the end of the Government's case, and was then summarily denied without argument. Petitioner urges that Section 16(a) of the Securities Exchange Act, 15 U.S.C. 78p(2), and the SEC's regulations implementing it, are so vague and indefinite both as to what is required to be done, and as to the persons who are subject to it, as to fail to establish an ascertainable standard of guilt and to meet the certainty required of a criminal statute. The Court of Appeals summarily disposed of these questions, saying that they "bordered on the frivolous".

Count 5 charged that, during the period from August 1, 1957 through February 13, 1959, petitioner, while an officer, director and stockholder of Jacobs, wilfully, knowingly, and without just cause hindered, delayed and obstructed the making and filing with the Commission and the Exchange of the annual report of Jacobs for the fiscal year ending July 31, 1958, on Form 10-K which was required to be made and filed within 120 days after the close of the fiscal year by the Commission's Rule X-13A-1. Petitioner was convicted on such count.

Counts 6 through 9 each charged that petitioner, while an officer, director and stockholder of Jacobs, wilfully, knowingly and without just cause hindered, delayed and obstructed the making and filing with the Commission and the Exchange of current reports on Form 8-K for the calendar months of September, November, and December, 1958, and January, 1959, as required by the Commission's Rule X-13A-11, reflecting for each such month the disposition of a significant amount of assets of Jacobs otherwise

than in the ordinary course of business. The District Court dismissed Counts 6, 7, and 8, at the close of the Government's case. Petitioner was convicted on Count 9. The conviction on Count 9 was reversed by the Court of Appeals, which found that the Government had not established that such a report was required, and that there was no basis of a finding that the violation of the reporting requirement was knowing and willful. The Court of Appeals said "we therefore do not reach the question of whether the SEC's instructions are sufficiently intelligible to support a criminal conviction as a matter of due process".

Count 21 charged petitioner, defendant Eveleigh, the corporate defendants and four other individuals with conspiring to violate Sections 16, 20 and 32 of the Securities Exchange Act and to defraud the United States by impeding, impairing, obstructing and attempting to defeat the lawful functions of the SEC, by unlawfully, wilfully and knowingly failing to file individual Form 4 reports for the months of December 1958 and January 1959, and on behalf of Comficor for the eleven months above referred to, and by unlawfully, wilfully and knowingly, and without just cause, hindering, delaying and obstructing the making and filing by Jacobs of the annual report on Form 10-K for the fiscal year ending July 31, 1958, and the current reports on Form 8-K for the months of September, November, and December, 1958, and January, 1959.

In addition to charging a conspiracy to fail to file the specific reports covered by the twenty substantive counts of the indictment, there was included in the conspiracy count paragraph 7, which charged as a purpose of the conspiracy objectives which concededly were not and could not be violative of Federal Law. Paragraph 7 of the conspiracy count charged that:

> "7. It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Comficor, Inc., Chatham Corporation,

and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and subject to primary and contingent liabilities and cause to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co., for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander P. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

Petitioner moved, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure, to strike paragraph 7 from Count 21, but this motion was erroneously denied by the District Court to the great prejudice of petitioner. Petitioner was convicted on the conspiracy count, and that conviction was affirmed by the Court of Appeals.

By denial of petitioner's motion to strike there became available, and was utilized, a device of the character condemned in *Stirone* v. *United States*, 361 U. S. 212, whereby petitioner was prosecuted and convicted of offenses other than those with which he was charged. On the basis of the inclusion of such purposes as an objective of the conspiracy, the trial court admitted masses of evidence having no relationship to the charges of failure to file reports, or to the alleged conspiracy to violate the statutory provisions under which the substantive counts were laid. Through such device the whole emphasis of the trial was laid on corporate looting and manipulation, offenses as to which no charges had been made against petitioner, and as to which the judgment of conviction contains no reference. This so became the dominant aspect of the trial that the trial court instructed the jury in its charge:

> "Summarizing the alternatives, it is for you to decide whether Comficor was merely a nominee

for the convenience of persons who had faith in the future earning capacity of Jacobs and wanted to make a legitimate profit from an anticipated rise in the market price of the stock, or whether Comficor was a device to loot the Jacobs' assets and to manipulate the market price in Jacobs' stock; whether the letters of credit in the Classic Carpet transactions were just commercial transactions for the payment of goods, or were they circuitous devices to siphon off Jacobs' assets; whether Comficor existed and operated for sound business reasons or as a cloak for fiduciary self-dealing and manipulation of Jacobs stock; whether Comficor's purchases of Jacobs stock at high closing prices were just optimistic appraisals of the Jacobs company or a calculated scheme to boost the market price to enable Guterma and Eveleigh to sell their Jacobs stock at a profit through the route of pledges with money lenders; whether numerous brokerage houses were used to meet margin requirements or to hinder SEC investigation and detection of insider deals; whether the repeated pledging of substantial assets at high interest rates was to raise cash for valid business reasons or to siphon off Jacobs assets for the defendants' personal use or benefit; whether puppets were used as executives of Comficor just to comply with necessary corporate formalities or to effect fraud and deception; whether cash was removed from subsidiaries to the New York office for legitimate expansion of Jacobs business or as a step in a scheme to loot the assets; whether a Swiss bank was used for efficiency or secrecy; whether the records were kept from the assistant treasurer of the corporation because he was incompetent or because he was too efficient; whether the financial books were removed from Detroit to effect an economy or to play hide and seek with them away from the eyes of honest accountants; whether the statement by Guterma that

60,000 shares of Scranton stock were with the transfer agent and in the Jacobs office at the time when they were actually pledged with money lenders was an innocent lapse of memory or an outright lie." (Transcript, pp. 4964-66)

* * * * *

"It is for you to decide whether the defendants were picking up Jacobs stock at low option prices and unloading it at a higher price through the device of pledges to secure loans which they had no intention to repay, knowing that the stock would drop when the day of reckoning came, when the Stock Exchange demanded an annual report, and that then the money lenders would sell them out." (Transcript, p. 4962)

* * * * *

"* * * Another purpose of this requirement is to prevent manipulation of the stock market. In a free securities market, as in any other, prices respond to supply and demand in the form of the bid and asked quotation. Insiders could easily rig the market for their own benefit, at the expense of the outside public stockholders, if they can keep the price up by concealing buying in substantial volume, especially if they are selling with one hand and buying with the other, so that there is a wash sale with no money really changing hands." (Transcript, p. 4898)

The impact of these highly prejudicial statements by the Court (almost all of which were unrelated to the offenses charged in the indictment), coupled with the further instructions (Transcript, p. 4976):

"If you find that the law has been violated as charged, you should not hesitate because of sympathy, or for any other reason to render a verdict of guilty, as a clear warning to all that crimes such as charged here

> may not be committed with impunity. The American public is entitled to be assured of this."

was such that a jury, faced with determining the guilt of four defendants on seventeen counts of an indictment, after two months of trial, and, after an instruction from the Court that the jury was to return separate verdicts as to each defendant and as to each count (Transcript, p. 4973), could not and did not deliberate or pass upon each count and each defendant separately. Within two hours after it retired, the jury came in with a verdict of one word—"Guilty" (Transcript, p. 5002).

The Court of Appeals said "There is somewhat more in appellants' contention that so much of the trial was devoted to these transactions as to have created a hazard that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted". The Court of Appeals dismissed petitioner's objections to the quoted portions of the judge's charge because it construed some of such portions as being applicable only to the conspiracy count, although it conceded that "there is a certain unreality in supposing that the jury would remember these details from a charge taking nearly a hundred pages of the typewritten transcript".

Petitioner had moved, pursuant to Rules 7(f) and 16 of the Federal Rules of Criminal Procedure, for bills of particulars and discovery and inspection, for the purpose of preparing for trial. Petitioner sought to ascertain through such bills of particulars what the transactions were which the Government claimed resulted in changes of beneficial ownership of Jacobs stock, what transactions the Government claimed were significant dispositions of assets of Jacobs otherwise than in the ordinary course of business, and what the transactions were by which assets and credit of Jacobs were utilized for the use,

benefit, and unjust enrichment of the defendants. Absent such particulars, it was impossible for petitioner to prepare for trial, Jacobs being a company with gross revenues of millions of dollars a year.

The District Court initially denied petitioner's motion for a bill of particulars and discovery on the ground that the matters sought were "of an evidentiary nature." However, on reargument, discovery was granted in part. The orders of the District Court directed that the Government furnish petitioner with all records and documents relating to all dispositions of assets of Jacobs allegedly required to be reported on Form 8-K current reports for the four months specified in the indictment, and also to all instruments, papers, documents and records relating to the allegation that the assets and credit of Jacobs were transferred, assigned, pledged, hypothecated, or otherwise encumbered and subjected to primary and contingent liabilities for the use, benefit and unjust enrichment of the defendants.

The discovery order of the District Court was flouted and disobeyed by the Government. The Government did not make available the documents in its possession relating to such matters and transactions which it thereafter offered into evidence at the trial.

Despite the order of the District Court, the Government throughout the trial offered in evidence quantities of documents purporting to show diversion of assets of Jacobs for the alleged benefit of petitioner. Repeatedly, defense counsel unsuccessfully objected to the receipt of such evidence on the ground that there had been noncompliance with the discovery order. On only the first such occasion, did the trial court direct that the witness be withdrawn and returned later in the trial after the defense had had an opportunity to examine the proffered exhibits. In all other instances the only action taken by the trial court was to take a ten or fifteen minute recess

during which such documents might be examined by defense counsel in the court room, or to direct that defense counsel examine them during the luncheon recess. Such cursory examination could not and did not provide petitioner with the opportunity of readying a defense with respect to these specific transactions as to which no references had been made in the indictment. The prejudice to petitioner by the surprise injection of these matters into the trial is evidenced by the Government's emphasis upon them in its summation (Transcript, pp. 4714-22, 4772, 4811-24), and upon the trial court's emphasis upon them in the quoted portion of the charge.

The Court of Appeals dismissed petitioner's objections to the Government's failure to comply with the pre-trial order, merely saying "we find either that the documents in question were outside the scope of the order or that defendants were not prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested".

The error in receiving such evidence was further compounded by the trial court permitting the Government to place in evidence, over strenuous objection, a series of admittedly grossly inaccurate charts and reports fabricated from speculation and conjecture and not from fact or evidence (Exhibits 21, 431, 432, 471, 472, 473, 474, 475, 476, 493, 494, and 495). The prejudice resulting from the admission into evidence of such charts is evidenced from the fact that they were the only exhibits requested by the jury in reaching its verdict. The Court of Appeals, in its opinion, did not pass upon or comment upon this point which was raised by petitioner at the trial and on appeal, despite the fact that such charts were clearly inadmissible under its own decision in *United States* v. *Altruda*, 224 F. 2d 935 (2nd Cir., 1955).

Petitioner's trial commenced on December 7, 1959, and concluded on January 27, 1960, when the jury, after two hours deliberation, returned a general verdict of "Guilty". The trial court immediately revoked bail and remanded petitioner. Subsequent applications for bail pending appeal were denied by the District Court, on the ground that petitioner having been born abroad, having resided in the Far East for many years, being an accomplished linguist, and having had extensive business dealings with foreign banks and companies, there was a sufficient likelihood of flight to justify the withholding of bail. The Court of Appeals and Mr. Justice Harlan, as Circuit Justice, on further applications for bail pending appeal, declined to disturb the denial of bail by the District Court on the ground that they could not say that there was not a basis for such a finding.

The trial court sentenced petitioner to two years on each of the fifteen substantive counts on which he was convicted, and to four years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed total fines of $160,000, consisting of $10,000 on each of the sixteen counts, petitioner to stand committed until the total fine is paid. With the reversal of the convictions on Counts 2 and 9, the fine was reduced to $140,000.

Reasons for Granting the Writ

Question 1. This case is the first criminal prosecution for violation of the reporting requirements of the Securities Exchange Act of 1934. It presents a record of such overzealous efforts to bring about a conviction and such an abuse of the prosecutorial function as to result in irregular and unfair procedures inconsistent with the requirements

laid down by this Court, and in a denial of justice and due process of law.

Petitioner was subjected to a massive attack, in the courts and in the press, by the Government. In the short space of a few months, petitioner was named as a defendant in four indictments, aggregating seventy-five counts, brought in three separate Districts. Petitioner's private papers and files were seized by the Government and impounded, and not made available to him until a few days prior to the commencement of the trial herein. *United States* v. *Gaterma*, 24 F.R.D. 134, reversed 272 F. 2d 344 (2nd Cir. 1959).

The publicity campaign to which petitioner was subjected was initiated and fed by the Securities and Exchange Commission. The contamination of public opinion resulting therefrom was such as to come within the statement of Mr. Justice Jackson in his concurring opinion in *Shepherd* v. *Florida*, 341 U. S. 50, 51, that "these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated".

The Court of Appeals acknowledged that the effect of this Government-inspired publicity was such that petitioner might not have had a fair trial if the trial had taken place in the spring of 1959, but concluded that the publicity had so abated by December of 1959 that the contention was no longer valid. But, as Mr. Justice Frankfurter said in his dissenting opinion in *Stroble* v. *California*, 343 U. S. 181, 201, "Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror • • •". See *The Right To An Impartial Jury*, 60 Col. L. Rev. 349-380. The distinction made by the Court of Appeals that there might be validity to this claim

of prejudice if the charge against petitioner were one of murder or rape, but not where he is charged with "the violation of requirements about which few jurors have ever heard or even the looting of a company relatively unknown" has no basis. And it indicates recognition even by the Court of Appeals that petitioner was convicted of corporate looting.

Inclusion in the count charging a conspiracy to violate the reporting requirements of the Securities Exchange Act of a paragraph charging as one of the purposes of the conspiracy state crimes of misappropriation, conversion, embezzlement, and theft, and the denial of a motion under Rule 7(d) of the Criminal Rules to strike such paragraph from the indictment, were contrary to the rule laid down by this Court that state crimes are not the proper subject of Federal indictment. *Parr* v. *United States*, 363 U. S. 370; *Ingram* v. *United States*, 360 U. S. 672, 683; *Ford* v. *United States*, 273 U. S. 593, 602.

The denial of such motion was likewise contrary to the decision of the Court of Appeals itself in *United States* v. *Abel*, 258 F. 2d 485 (2nd Cir., 1958), affd. 362 U. S. 217. In that prosecution for conspiracy to violate the espionage laws, the indictment contained an allegation that it was part of the conspiracy to engage in acts of sabotage. The Court of Appeals held the allegation as to sabotage was improperly included in the indictment, and that the defense motion to strike it should have been granted.

The Court of Appeals said that it did not reverse for this error only because the Government produced no proofs as to sabotage during the trial, and the trial court did not charge the jury as to sabotage, other than to instruct it that the indictment was not evidence and was not to be considered as evidence.

Contrast the situation in *Abel* with that here, where the compelling proofs related to uncharged looting and mani-

pulation, and the trial judge so emphasized them in his charge as to make them the dominant and controlling questions for the jury. By such ruling, the trial court opened the floodgates to receipt of hundreds of pages of testimony and voluminous exhibits, all irrelevant to the thrust of the indictment, highly inflammatory and prejudicial to petitioner, and yet so emphasized that they must have been the base upon which the jury rendered its verdict.

The gigantic pyramid of prejudice that flowed from this basic error so influenced the trial as to completely overshadow the legally framed charges in the indictment. That petitioner was being tried for alleged violations of the reporting requirements of the Securities Exchange Act and a conspiracy to violate such provisions was all but forgotten. The case assumed the character of a state court trial for larceny, and the elements of Federal jurisdiction became purely incidental. Applying this Court's test set forth in *Stirone* v. *United States*, 361 U. S. 212, 215-217, 219, petitioner asks: "Can this Court in good conscience say with certainty that such proofs, and such portion of the charge played no part in the verdict of the jury and that petitioner was convicted only on the evidence and instructions relating to the failure to file reports?" See also *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, 619.

The Court of Appeals, while recognizing the hazard that so much of the trial was devoted to testimony concerning looting and manipulation "that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted", sought to soften the issues of looting and manipulation put by the trial judge to the jury by referring to his statement thereafter that "Considering these matters and others, which you no doubt have in your minds, you must determine if the conspiracy charge existed". But, to paraphrase the Court of Appeals, there is a certain unreality in supposing

that the jury would remember this detail from a charge taking nearly a hundred pages of the typewritten transcript, and in which the dramatically delivered passage, set out on pages 15, 16 and 17 hereof, was the nuclear charge. And references to manipulation and looting appeared elsewhere in the charge (Transcript, pp. 4898, 4962, 4976).

The receipt of evidence in support of these allegations of embezzlement, misappropriation, theft, and conversion, and the portions of the charge relating to them, were of such a character as to bring to bear the principle that "Conviction upon a charge not made would be a sheer denial of due process" as expressed time and again by this Court in *Parr* v. *United States*, *supra*, pp. 393-4; *Stirone* v. *United States*, *supra*; *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Cole* v. *Arkansas*, 333 U. S. 196, 200-1; *In re Oliver*, 333 U. S. 257, 273. The inclusion of the offending paragraph in the conspiracy count, the receipt of evidence in support of it, and the portions of the charge relating to them together constituted a device whereby petitioner could be and was convicted of an offense with which he were not charged. The Court of Appeals sought to justify the receipt of such evidence on the ground that "it was relevant for the Government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public". That this was *not* the theory on which such evidence was received was made clear when the trial court refused the Government's request for an instruction that the jury might consider such evidence as proof of motive (Transcript, p. 4987). And in other cases the Court of Appeals has held it to be reversible error to receive such evidence. *United States* v. *Masino*, Docket No. 25419, decided February 18, 1960.

The prejudice of this was further compounded by the surprise and resulting inability to defend adequately

against such claims of embezzlement through the denial of petitioner's motion for a bill of particulars. To this was added persistent flouting and non-compliance by the Government with the District Court's order of discovery directing that petitioner be furnished before trial with the documents relating to all transactions through which the Government claimed that the assets and credit of F. L. Jacobs Co. were diverted for the use and unjust enrichment of petitioners. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *United States* v. *O'Connor*, 237 F. 2d 466, 475-6.

It was hardly a cure for the deficiency to expect counsel for four defendants to read and assimilate the contents of a single copy of voluminous documents thrown at them during a ten minute recess called for such purpose, and at the same time prepare their voir dire and cross examination. Forcing the defense to prepare cross examination as testimony was elicited from the lips of Government witnesses without any of the advance preparation to which petitioner was clearly entitled under the order of discovery was to transform the serious business of a criminal prosecution into a game of wits, with our system of justice as well as petitioners the loser.

And prejudice was further compounded by the receipt into evidence of Government-offered charts and reports concededly inaccurate, and based upon conjecture, speculation, and guesswork. This was a further abuse of discretion by the trial court, violative of the rule laid down by the Court of Appeals in *United States* v. *Altruda*, 224 F. 2d 935 (2d Cir., 1955). Although raised by petitioner in the Court of Appeals, as well as in the District Court, this point was not referred to by the Court of Appeals in its opinion. The significance of these charts, and their importance, is evidenced by the fact that they were the only exhibits which the jury requested during its deliberations. And of these thirteen chart-exhibits, all but one related solely to claimed diversions by petitioner of assets of Jacobs, and only one related to reporting requirements.

An example of such evidence is Exhibit 21, a "financial statement" of Jacobs as of July 31, 1958, prepared and released by remarkable coincidence at the commencement of the trial. This statement carried with it the statement by Ernst & Ernst, the accountants who prepared it, that they could not certify it because the contents were not substantiated, and reflected speculation, opinion, and guesswork. It was based upon hundreds of green ink and black ink entries made by one Locke long after petitioner had left Jacobs and which, by admittedly arbitrary guesses, wrote off millions of dollars of assets and set up unestablished liabilities, and adjustments. The inability of the accountants to certify its accuracy is understandable, the refusal of the trial court to exclude it from evidence is not.

Certainly in criminal prosecutions such statements are admissible only to the extent that they reflect correct entries, and the true condition of the corporate records, except to the extent that such records may have been prepared by the defendants. *Beck* v. *United States*, 33 F. 2d 107 (8th Cir., 1929); *United States* v. *Feinberg*, 140 F. 2d 592 (2d Cir., 1943), cert. den. 322 U. S. 726. It is no answer to say as did the Court of Appeals that "it was open to defendants to prepare counter-exhibits embodying their version of the evidence"—particularly when the prosecution's exhibits were withheld from them until the trial.

Such aspect of fairness as still remained in this trial was eliminated when the trial court purported to summarize the facts to the jury. Any summary must be fair and adequate, and not one-sided, *Williams* v. *United States*, 93 F. 2d 685 (9th Cir., 1938). In any summary, the judge must state the evidence fairly and accurately, both that which is favorable to the accused and that which is unfavorable. *Buford* v. *United States*, 185 F. 2d 171 (10th Cir., 1950). And, although he may dissect and analyze the evidence, the trial judge may never distort it. *United States*

v. *Stoehr*, 100 F. Supp. 143 (D. Pa., 1951), affd. 196 F. 2d 276, cert. den. 344 U. S. 826. Here the charge throughout emphasized and referred to unfavorable evidence adduced by the Government, and passed over and omitted evidence favorable to the petitioner. It reflected a virtual, though veiled, instruction to the jury to return a verdict of guilty as a matter of public duty.

The prejudicial character of the charge is indicated by the Court of Appeals' dismissal of the conviction on two counts specifically because of the portions of the charge relating to them. But the prejudice and unfairness of the charge were even greater as to the counts which were unreversed.

In sum, here was such a denial of due process of law, here was such an abuse of the prosecutorial function, that the conviction must be reversed, and the indictment dismissed. It is no answer to say, as did the Court of Appeals, that "if defendants choose to avail themselves of their constitutional right to a jury trial, they must take its frailties along with its strengths".

Questions 2 and 7. Petitioner stands convicted on twelve counts charging failure to file reports required by Section 16(a) of the Securities Exchange Act, 15 U.S.C. § 78p(2) and the Commission's Rule X-16. This is the first criminal prosecution to have been brought under these provisions. According to the Annual Report of the Commission for 1959, more than 39,000 persons come within the reporting requirements of these provisions. There is, accordingly, a large and important public interest in settling the constitutional questions and the questions of construction relating to these provisions which have been raised in this case.

Petitioner urges that the statutory provision and the Commission's rules are so vague and indefinite in their meaning as to fail to establish an ascertainable standard of guilt, and that, even though they may be valid as a dele-

gation of administrative power, they are invalid as a criminal statute. *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 243. Indeed, such a likelihood was anticipated by Congress when it provided in the separability provision of the Act that "If any provisions of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby." Title 15, United States Code, Section 78gg.

The standards of certainty in criminal statutes must be so definite, both in regard to the persons subject to the Act and in regard to the applicable tests to ascertain guilt, that men of common intelligence are not required to guess at its meaning. *Winters* v. *New York*, 333 U. S. 507, 515-6; *United States* v. *Cardiff*, 344 U. S. 174, 176; *M. Kraus & Bros.* v. *United States*, 327 U. S. 614, 622; *People* v. *Caswell-Massey Co.*, 6 N. Y. 2d 497.

That the Commission's rules relating to the requirements of these reports are vague and difficult to understand, and require clarification, has been acknowledged by the Chairman of the Commission itself. *Hearings before Senate Committee on Banking and Currency, Stock Market Study*, 84th Congress, 1st Session, page 961.

Questions 3 and 4. Eleven of the twelve Form 4 counts on which petitioner was convicted have to do with the requirement that a beneficial owner of ten per cent or more of an equity security registered on a national securities exchange (other than an exempted security) must file reports as to any changes in such person's beneficial ownership. Such counts charge that the defendant Comficor, Inc., in each of eleven months, was required to file such reports, and failed to do so, petitioner being charged as an aider and abettor. The Government offered no proofs that petitioner was aware that such reports were required

or that he in any way assisted or brought about the alleged violations. The standards of proof established for a conviction as aiders and abettors in *United States* v. *Williams*, 341 U. S. 58, 64, and in *Turnipseed* v. *United States*, 272 F. 2d 106 (7th Cir., 1959), were not met.

Although Section 3 of the Act, 15 U.S.C. § 78c, defines most of the terms used in the Act, there is no definition of the terms "beneficial ownership" or "change in beneficial ownership" there or elsewhere in the statute, and such terms are not defined in any of the Commission's rules. The representative of the New York Stock Exchange who testified at the trial could not define these terms other than to say that they were to be distinguished from "record ownership" (Transcript, pp. 1104-6). And the trial court charged the jury that "the term 'beneficial ownership' means, in the context of this case, ownership as distinguished from mere record ownership" (Transcript, p. 4913). But neither the statute nor the rules so define it.

Whether or not Comficor was required to file such reports during the eleven months to which these counts relate depends on whether it was the beneficial owner of ten per cent or more of the Jacobs shares "registered" on the Exchange, the word "registered" being the term used in Section 16(a) of the Act, 15 U.S.C. § 78p(a). Section 12(b) of the Act, 15 U.S.C. § 78*l*, defines the manner in which shares become registered—providing that "a security may be registered on a national securities exchange by the issuer filing an application with the exchange".

The Commission, in implementing Section 16(a) with its Rule X-16A, has abandoned the requirements established by Congress and established new requirements of its own. Thus, Rule X-16A-1(a) provides that "None of the reports provided for in Section 16(a) need be made except as provided in this rule". Although Section 16(a) relates its requirements to securities *registered* on an exchange, the Commission, in Rule X-16A, has eliminated

reference to "registered" securities, in the reporting requirement, and relates the requirements instead to "listed" securities. This term nowhere appears in the Act. That "listed" and "registered" are two different terms with different meanings is apparent since the Rule then requires that reports as to "listed" securities must be filed with each exchange on which such equity securities are listed and registered. And the representative of the Stock Exchange testified that they had different meanings. (Transcript, pp. 3682-3, 3688-90, 3696-7, 3709, 3718, 3729-32.) This represents "a gross administrative usurpation of legislative power not to be tolerated". *Gross v. New York City Alcoholic Beverage Control Board*, 7 N. Y. 2d 531, 200 N.Y.S. 2d 12, 16 (1960).

The Commission has defined the term "listed" by its Rule X-3B-1 which provides that the term includes securities for which authority to add to the list on official notice has been granted. The plain meaning of this is that the shares become listed at the time that the exchange grants the authority for them to be listed.

The evidence at the trial was clear that such authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock, including 332,607 shares reserved for the conversion of outstanding preferred shares and for the exercise of options, and that no further authority was required from the Exchange for the listing of any of such shares (Exhibit 490; Transcript, pp. 3729-31).

The prosecution contended that the term "listed" comprehended only those shares which were issued and outstanding as common shares, and none else, thus excluding from the base the crucial 332,607 shares authorized and reserved for the conversion of preferred and the exercise of options. Both the trial court and the Court of Appeals accepted the prosecution's contentions. Although the statute refers to beneficial ownership of ten per cent or

more of the registered shares, and nowheres refers to "issued shares", the Court of Appeals held that "in making issued shares the quantum to which the 10% test is to be applied, the SEC acted consistently with the language and purpose of Congress". And this despite the Court's recognition that many corporations had such unissued shares registered.

Petitioner's interpretation is reinforced by other sections of the Act. Section 12(a) makes it unlawful for any exchange member, broker or dealer to effect any transaction in any security on an exchange unless a registration is effective as to such security for such exchange. *Standard Fruit and S. S. Co.* v. *Midwest Stock Exchange*, 178 F. Supp. 669 (N. D. Ill., 1959). The Commission's own Rules X-12A-4 and 5 under such section permit trading in warrants, rights and options to purchase a security even though the shares to which they relate are still unissued. And Section 3(a)(11) of the Act defines the term "equity security" to include specifically "any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right". See also *Truncale* v. *Blumberg*, 80 F. Supp. 387 (SDNY, 1948), 88 F. Supp. 677 (SDNY, 1950), aff'd 182 F. 2d 1021 (2d Cir., 1950); *Park & Tilford, Inc.* v. *Schulte*, 160 F. 2d 984 (2nd Cir., 1947), cert. den. 332 U. S. 761.

Petitioner urges the correctness of his interpretation, as it is supported by the notice of authorization of the larger number of shares addressed to petitioner by the Exchange in the very month when the Government contends that the ten per cent mark had been reached, and a report was required (Exhibit 490). But, in any event, the conflicting requirements in the Act, in the rules of the Commission, in the Form 4 instruction sheets, and in the rules of the Exchange, are such that it cannot be said that "the elements of evasive conduct have been so clearly

expressed by the Commission that the ordinary citizen can know in advance how to avoid an unlawful course of conduct without being required to guess at the meaning of the requirement". *Winters* v. *New York*, *supra*; *M. Kraus & Bros.* v. *United States*, *supra*.

5. Each of the substantive counts of the indictment upon which petitioner was convicted is laid under Section 32(a) of the Securities Exchange Act, 15 U.S.C. § 78ff. Petitioner urges that this section is fatally defective and contravenes his constitutional guarantees under the Fifth Amendment.

The first clause of this section provides:

> "Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful, or the observance of which is required under the terms of this chapter * * * shall upon conviction be fined not more than $10,000, or imprisoned not more than two years * * *".

The next and last clause of this section then provides that:

> "* * * but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

A host of difficulties arises with any attempt to apply Section 32(a). To sustain the charge contained in the indictment, the prosecution must establish beyond a reasonable doubt that the defendants acted willfully. And the term "willfully", as used in the Securities Exchange Act comprehends knowledge on the part of the defendants. As to this, there can be little doubt.

During the House hearings on the Securities Exchange Act, the meaning of the term "wilful" as used in this

section was explored and probed by members of the House Committee in their examination of one of the draftsmen of the Act—Mr. Thomas G. Corcoran. Mr. Corcoran was specifically asked the question as to the meaning which the draftsmen intended to give to the term "wilfully" as used in this section, and he testified that it meant "willfully and knowingly" (House, Hearings, *Stock Exchange Regulation*, p. 1133). This, of course, was consistent with this Court's definition of the term in *United States* v. *Murdock*, 290 U. S. 389, 394-5, and in *United States* v. *Illinois Central Railroad Co.*, 303 U. S. 239, 243. In *United States* v. *Murdock*, *supra*, it was said:

> "The word often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act."

This is the same meaning which has been applied by the Commission itself in *Matter of Halsey, Stuart & Co.*, Securities Exchange Act Release No. 3410, where the Commission found that Halsey Stuart & Company's violation of the statute had not been willful because "the analysis of Halsey's obligation to deliver prospectuses has involved highly technical controversy over methods of tracing inventory through trading periods" despite the admitted facts that the firm was fully aware that it was not delivering prospectuses.

Indeed, each of the counts of the indictment expressly charges that the failure of petitioner to file the reports required occured "unlawfully, willfully, and knowingly". This, of course, was consistent with the interpretation given "willfully" by the draftsman of the Act, and by

the Commission in administering it, as well as with this Court's decision in *United States v. Murdock, supra*, also involving a reporting statute where it was said at page 396:

> "He whose conduct is defined as criminal is one who *willfully* fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be wilful to be criminal is persuasive that the same element is essential to the offense of failing to supply information." (Italics added.)

Here the element of knowledge was a crucial issue. As to the Form 4 counts, the meaning, or confusion as to the meaning, attributed by the Commission to "beneficial ownership" and what constituted ten per cent of the registered shares of Jacobs stock were the pivotal factors as to such counts. And, as to the four SK counts (all eventually dismissed) knowledge and understanding of the Commission's rules, and what they meant or were intended to mean, were the heart of the matter.

Yet the thrust of the final clause of Section 32(a) is to shift the burden of proof of this essential element of their own crimes upon petitioner, for it requires that he himself prove that he had no knowledge of such rule or regulation. Such a provision is in direct conflict with our basic concept that an accused needs not even assert a defense until the Government has established *all* of the elements of the offense with which he is charged. Since a conviction necessarily carries a finding

that the defendant had knowledge of the rules and regulations, no one convicted could claim the benefit of the last clause of Section 32(a) and thus obtain the protection which Congress intended to give him. And, indeed, in the twenty-six years of the Act's life, no one has been able to claim such protection.

The defects of this provision are strikingly illustrated and compounded by the circumstances here. Presenting no proof of willfulness, the Government seemingly rested on a presumption of willfulness not available otherwise than through this penal section, which requires a defendant to take the stand in order to disprove the element of willfulness and thus avoid imprisonment and, apparently, conviction. Here the trial court rejected petitioner's offer to take the stand unless his right not to incriminate himself under the other three indictments then pending were protected. Under such ruling, taking the stand to disprove the element of willfulness would have thus exposed petitioner to a searching examination concerning the facts of such other pending indictments and would have further infringed upon his constitutional right against self-incrimination.

The importance of a ruling by this Court as to this question is evidenced by the fact that, as stated in the Commission's 1959 annual report, during such year alone 44 persons were indicted under the Act.

6. The District Court denied petitioner's request for a ruling that, on his taking the stand, the scope of cross examination would be limited so as to preclude examination into the unrelated subject matter of the other three indictments then pending against him. This refusal was such an abuse of the prosecutorial function as requires this Court to exercise its supervisory powers over the conduct of Federal criminal trials.

When such application was made, the prosecution protested that no authority for such a ruling existed. The trial judge then said:

> "Ordinarily that would be true except in this area here the practice is sometimes to rule on the issue even to the point of making the prosecution state its questions in writing ahead of time". (Transcript, pp. 1258-60).

Nevertheless, at the conclusion of the prosecution's case, the trial court said:

> "Well, I don't think that I am required to make any ruling at this time other than to tell you, and to remind government counsel, that the scope of cross examination must stay within the bounds of the *Provoo* rule and beyond that I cannot rule." (Transcript, pp. 4117-4120.)

In circuits other than the Second Circuit, it has been the rule that when a defendant takes the stand in a criminal case, he may not be impeached on cross examination except by proof of conviction of a crime, and that acts of misconduct not resulting in such a conviction are not properly subjects of cross examination. As stated in *Edwards* v. *United States*, 18 F. 2d 402 (8th Cir., 1927), the rule is:

> "Nothing short of conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted for the reason that innocent men are often arrested charged in a criminal offense. * * * The authorities heretofore cited are conclusive that no witness can, on cross-examination, be asked questions of this nature nor is such evidence, even if sought to be established by other witnesses, admissible against the defendant".

This is the rule followed generally in other circuits. See *Banning* v. *United States*, 130 F. 2d 330 (6th Cir.,

1942); *Stansbury* v. *United States*, 219 F. 2d 165 (5th Cir., 1955); *Manley* v. *United States*, 238 F. 2d 221 (6th Cir., 1956); *Little* v. *United States*, 93 F. 2d 401 (8th Cir., 1937); *United States* v. *Nettl*, 121 F. 2d 927 (3rd Cir., 1941); *Johnson* v. *United States*, 318 U. S. 189.

Only the Second Circuit has departed from this rule, the Court of Appeals there having permitted the cross-examination of defendants who have taken the stand as to misdemeanors, disbarments, and even criminal acts which were not established by a judgment of conviction. *United States* v. *Schiller*, 187 F. 2d 372; *United States* v. *Gruber*, 123 F. 2d 307; *United States* v. *Buckner*, 108 F. 2d 921; *United States* v. *Frankel*, 65 F. 2d 285. See *Provoo* v. *United States*, 215 F. 2d 531 (2d Cir., 1954).

In *Provoo*, the defendant, charged with treason, took the stand in his own defense. The prosecution on cross-examination directed questions to him designed to show that he had been charged with being a homosexual. Because of this, the judgment of conviction was reversed.

In the *Provoo* decision, however, the Court of Appeals did not repudiate the separate rule of the Second Circuit, nor did it state that the rule followed by other Circuits would now be applied there. It confined itself to the narrow area of the questions as to homosexuality, holding that they were so inflammatory and prejudicial, as well as so obviously irrelevant to the question of whether the defendant had committed treason, that it reversed the conviction.

That the only questions which would be barred under the *Provoo* rule were those relating to homosexuality was evident from the prosecutor's statement, immediately on the trial court's ruling, that "the Government is not going to try to prove that Guterma is a homosexual". (Transcript pp. 4117-4120.)

Obviously therefore the ruling of the trial court placed petitioner in a very difficult dilemma. Petitioner desired

to testify fully with respect to the charges for which he was on trial. However, he faced the risk that if he did so he might be cross examined extensively as to other charges pending against him in the Federal courts which had not yet gone beyond the stage of indictment. He might thus be forced to furnish the Government with testimony which it might thereafter use to incriminate him in those other and separate cases. Moreover, answering a single question, he might lose his privilege of self-incrimination not only as to the charges for which he was on trial, but as to these other charges as well. *Rogers* v. *United States*, 340 U. S. 367, 378. He would be affording the Government full discovery as to those other charges.

To put petitioner to this risk if he took the stand in his own defense vitiated his constitutional guarantees against self-incrimination, and relegated the Fifth Amendment's privilege to a second-rate position. *Rogers* v. *United States*, *supra*, page 378. The denial of petitioner's application for a ruling was in conflict with the concept voiced in *Boyd* v. *United States*, 116 U. S. 616, 632, that the Fifth Amendment must be construed broadly, for to compel a person to convict himself of a crime is "contrary to the principles of a free government" and "abhorrent to the instincts of an American". It was an abuse of discretion and an infringement of petitioner's constitutional guarantees under the Fifth Amendment to refuse to rule that on cross examination the Government might not inquire as to the facts relating to such other indictments.

The Court of Appeals found no error in the refusal of such a ruling, merely saying "We are not aware of any requirement for such a ruling".

8. The imposition on petitioner of cumulative fines on each substantive count of the indictment is directly con-

trary to the policy of lenity laid down by this Court in *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218; *Bell* v. *United States*, 349 U. S. 81, and in *Ladner* v. *United States*, 358 U. S. 169, and previously adhered to by the District Court in *United States* v. *Personal Finance Company*, 174 F. Supp. 871. (SDNY, 1959).

Petitioner here was convicted on fifteen substantive counts, each charging violation of the Securities Exchange Act of 1934. Thirteen of such counts (the conviction on one of which was reversed on appeal) charged that petitioner had failed to file Form 4 reports called for under the Act. Two of such counts (the conviction on one of which was reversed on appeal) charged that petitioner had obstructed, hindered and delayed F. L. Jacobs Co. from making and filing reports required of it under the Act. The District Court imposed a maximum sentence of $10,000 on each of the fifteen substantive counts, and an additional fine of $10,000 on the conspiracy count, making a total fine of $160,000 imposed on petitioner. The reversal of the conviction on the two counts as noted, reduced the fine to $140,000. The trial judge directed that "the defendant is to stand committed until the fines are paid or he is otherwise discharged according to law".

In the *C.I.T.* case, *supra*, the indictment consisted of thirty-two counts, each count charging defendants with a separate offense for each alleged separate breach of the Fair Labor Standards Act. This Court held that the allowable unit of prosecution under that Act was a course of conduct, and that the Act was not to be read so as to enable the prosecutor to treat as a separate offense each breach of the obligations imposed thereby. In its opinion, the Court said:

> "When choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken language that is

clear and definite. We should not derive criminal outlawry from some ambiguous implication."

* * * * * *

"The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose, or action which may be deemed a single 'impulse', a conception recognized by this Court in the *Blockburger* case, *supra*, at 302 * * * Cf. *Blockburger* v. *United States*, 284 U. S. 299."

The Congressional wording of the Fair Labor Standards Act, which this Court found called for application of the policy of lenity, is identical with that of the Securities Exchange Act. It was therefore complete error for the courts below to have refused to apply the same policy.

The penal provision of the Fair Labor Standards Act provided "a maximum fine of $10,000 for any person who willfully violates any of the provisions of Section 15, 29 U.S.C. 215. Section 15 makes it unlawful for any person . . . (2) to violate any of the provisions of Section 6 or Section 7 . . . (5) to violate any of the provisions of Section 11(c) . . ." *United States* v. *Universal C.I.T. Credit Corporation*, *supra*, page 219, footnote 1.

The penal provision of the Securities Exchange Act, contained in Section 32(a) of the Act, 15 U.S.C. § 78ff. is couched in identical language. It provides that:

"Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, * * * shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both * * *".

In other respects, the enforcement provisions of the two Acts are similar. Thus, in the *C.I.T.* case, *supra*, this Court pointed out at page 222 that:

> "The penal provision of the Fair Labor Standards Act is only part of a scheme available to the Government and to the employee for enforcing the Act. The preventive remedy of an injunction and individual or class suits for restitution and damages in §16(b) are not only also available. They are the remidies more frequently invoked and more effective in achieving the purposes of the Act."

This is identical to the situation under the Securities Exchange Act. Such Act provides for injunctive remedies, and for individual and class suits for civil damages, all of which are frequently invoked. Moreover that the penal provisions of the Exchange Act, as under the Fair Labor Standards Act, are only a minor part of the enforcement machinery is shown by the fact that in the twenty-six years since the Act became law, the present case was the first criminal prosecution for violation of these sections of the Act.

More recently, in *Bell v. United States*, 349 U. S. 81, this Court reasserted the rule stated in the *C.I.T.* case, *supra*:

> "When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining of what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may be fairly said to be a pre-

sumption of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

The legislative history of the Securities Exchange Act discloses nothing to indicate a Congressional purpose of making "each stick in the faggot" a separate offense subject to a separate and cumulative sentence. To the contrary, the legislative reports and hearings all indicate a broad approach to the elimination of the courses of conduct which had been exposed by the Senate Committee on Banking and Currency.

Here there have been imposed on petitioner separate and cumulative fines on twelve counts, each of which charged a failure on his part to file Form 4 reports. However, the theory of the prosecution was that the failure to file all of these reports stemmed from a single impulse of thought and purpose, as described in *Blockburger* v. *United States*, 284 U. S. 299. This is evident from the conspiracy count in the indictment which alleged that the defendants and the other conspirators entered into a single agreement not to file the specific reports to which the substantive counts of the indictment related. See count 21, paragraphs 1, 9, 10, 11, and 12.

Ignoring the decisions of this Court in *Universal C.I.T. Credit Corp.* v. *United States*, *supra*; *Bell* v. *United States*, *supra*, and *Ladner* v. *United States*, *supra*, and relying upon decisions of this Court prior to *C.I.T.*, the Court of Appeals rejected petitioner's contention, saying: "To hold that each willful default in filing a monthly report is a separate offense is consistent both with the language of the statute and with the important purpose of achieving the timely filing of current information which Congress considered necessary for the protection of investors". Yet the language of the statute is identical with that in the Fair Labor Standards Act which the Court

in *C.I.T., supra*, held made a course of conduct the unit of prosecution. And the deterrent effect of cumulative punishment is a factor not to be considered where Congress has not specifically provided for cumulative punishment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Richard H. Wels,
Counsel for Petitioner.

New York, N. Y.,
August 12, 1960

APPENDIX A

Constitutional Provisions, Statutes, Rules and Regulations Involved

Constitutional Provisions

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes

Title 15, United States Code, Section 78m

(Section 13 of the Securities Exchange Act of 1934)

(a) Every issuer of a security registered on a national securities exchange shall file the information, documents, and reports below specified with the exchange (and shall

file with the Commission such duplicate originals thereof as the Commission may require), in accordance with such rules and regulations as the Commission may prescribe, as necessary or appropriate for the protection of investors and to insure fair dealing in the security—

(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to section 78*l* of this title;

(2) Such annual reports, certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports, as the Commission may prescribe.

(b) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination or depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter, and, in the case of carriers subject to the pro-

visions of section 20 of Title 49, or carriers, required pursuant to any other Act of Congress to make reports of the same general character as those required under such section 20, shall permit such carriers to file with the Commission and the exchange duplicate copies of the reports and other documents filed with the Interstate Commerce Commission, or with the governmental authority administering such other Act of Congress, in lieu of the reports, information and documents required under this section and 78*l* of this title in respect of the same subject matter.

(c) If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

Title 15, United States Code, Section 78p(a)

Section 16(a), Securities Exchange Act of 1934

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate origi-

nal thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

Title 15, United States Code, Section 78c(11) and (12)

Sections 3(a)(11) and (12), Securities Exchange Act of 1934

(a) When used in this chapter, unless the context otherwise requires—* * *

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12) The term "exempted security" or "exempted securities" shall include securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States; such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as shall be designated for exemption by the Secretary of the Treasury as necessary or appropriate in the public interest or for the protection of investors; securities which are direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof or any agency or instrumentality of a State or any political subdivision thereof or any municipal corporate instrumentality of one or more states; and such other securities (which may in

clude, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an "exempted security" or to "exempted securities".

Title 15, Section 78t(c), United States Code

Section 20(c) of the Securities Exchange Act of 1934

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange, without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title.

Title 15, United States Code, Section 78ff(a)

Section 32(a), Securities Exchange Act of 1934

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon

conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such a person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Title 15, United States Code, Section 78gg

Section 33, Securities Exchange Act of 1934

If any provision of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Title 18, United States Code, Section 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Rules

General Rules and Regulations Under the Securities Exchange Act of 1934

Rule X-3B-1. Definition of "Listed".

The term "listed" means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in dis-

tributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

Rule X-13 A-1. Requirement of Annual Reports.

Every issuer having securities listed and registered on a national securities exchange shall file an annual report for each fiscal year after the last fiscal year for which financial statements were filed in its application for registration. Registrants on Form S-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

Rule X-16 A-1. Reports Under Section 16(a).

(*a*) None of the reports provided for in section 16(*a*) need be made except as provided in this rule.

(*b*) RULE FOR THE USE OF FORM 4.—Every person who at any time during any month has been directly or indirectly the beneficial owner of more than 10 per cent of any class of any equity security (other than an exempted security) which is listed on a national securities exchange, or a director or an officer of the issuer of such security, shall, if there has been any change during such month in this ownership of any equity security of such issuer, whether registered or not, file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 4 (and a single duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes

in his ownership as have occurred during such calender month. Such statements must be received by the Commission and the exchange on or before the tenth day of the month following that which they cover.

* * * * * *

(*d*) RULE FOR THE USE OF FORM 6.—Every person who becomes directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security), which is listed on a national securities exchange, or becomes a director or an officer of the issuer of such security, shall file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 6 (and a single duplicate original thereof with the Commission) of the amount of all equity securities of such issuer, whether registered or not, so beneficially owned by him immediately after becoming such beneficial owner, director, or officer. Such statement must be received by the Commission and the exchange on or before the tenth day following the day on which such person became such beneficial owner, director, or officer. Such person need not file the statement required by this paragraph, if prior to such tenth day and during the calendar month in which he has become such beneficial owner, director, or officer, there has been a change in his beneficial ownership which will require him to file a statement pursuant to paragraph (*b*) of this rule with respect to the same securities.

Appendix A.

Rule 16a-2. *Ownership of More Than 10 Percent of an Equity Security.*

In determining, for the purpose of Rule 15a-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer; except that for the purpose of determining the percentage of ownership of voting trust certificates or certificates of deposit for equity securities, the class of voting trust certificates or certificates of deposit shall be deemed to consist of the entire amount of voting trust certificates or certificates of deposit issuable in respect of the class of equity securities which may be deposited under the voting trust agreement or deposit agreement in question, whether or not all of such class has been so deposited.

Rule X-16A-3(c). *Manner of Reporting Holdings and Changes in Ownership Under Rule X-16A-1.*

(c) Reports filed pursuant to Rule X-16A-1 may contain any relevant explanatory matter.

Federal Rules of Criminal Procedure

Rule 7(d). Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

Appendix A.

Rule 7(f). Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice may require.

Rule 16. Discovery and Inspection.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents, or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 21. Transfer from the District or Division for Trial.

(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

APPENDIX B

Opinion and Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 362—October Term, 1959.

(Argued June 7, 1960 Decided July 18, 1960.)

Docket No. 26198

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALEXANDER L. GUTERMA and ROBERT J. EVELEIGH,

Defendants-Appellants,

—and—

F. L. JACOBS CO., COMFICOR, INC., and CHATHAM CORPORATION,

Defendants.

Before:

LUMBARD, *Chief Judge*, and CLARK and FRIENDLY, *Circuit Judges*.

Defendants Guterma and Eveleigh appeal from a judgment of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, convicting them, after a jury trial, of offenses under § 32 of the Securities Exchange Act of 1934 and of conspiracy under 18 U. S. C. § 371. The judgment is affirmed except for the conviction of Guterma on Count 2 which is reversed, and of both

appellants on Count 9 which is reversed with directions to dismiss.

JEROME J. LONDIN, Exec. Ass't U. S. Att'y, David P. Bicks, Ass't U. S. Att'y (Morton S. Robson, Chief Ass't U. S. Att'y and George I. Gordon, Ass't U. S. Att'y on the brief), *for Appellee.*

RICHARD H. WELS (James L. Adler, Jr., Gabriel Galef and Moss, Wels & Marcus on the brief), New York, New York, *for Defendant-Appellant Guterma.*

EMANUEL ESCHWEGE, New York, New York, *for Defendant-Appellant Eveleigh.*

FRIENDLY, *Circuit Judge:*

Alexander L. Guterma and Robert J. Eveleigh appeal from a judgment of the District Court for the Southern District of New York which convicted them, after a jury trial, of various offenses under §32 of the Securities Exchange Act of 1934 and of conspiracy, under 18 U. S. C. §371, to violate the Securities Exchange Act and to defraud the United States by impeding and attempting to defeat the lawful functions of the Securities and Exchange Commission, all with reference to F. L. Jacobs Co., a company whose common stock was registered with the SEC under the Securities Exchange Act and listed on the New York Stock Exchange. Appellants were indicted along with Jacobs, which first pleaded guilty and later *nolo contendere*, and Comficor, Inc. and Chatham Corporation, alleged to be personal holding companies of Guterma, which were convicted on certain counts but have not appealed. The trial took all or part of 34 days. We have concluded that the judgment convicting Guterma and Eveleigh should

be affirmed with two exceptions: Guterma's conviction on Count 2 relating to his failure to file an "insider's report" (Form 4) for January, 1959, and the conviction of both appellants on Count 9 relating to their alleged willful hindering of the filing of a current report (Form 8-K) of Jacobs for January, 1959.

The indictment, which was in 21 counts, related to various matters concerning Jacobs, whose business had been that of a subcontractor for automotive parts. In March, 1956, Guterma acquired 20,000 Jacobs shares of a total of 875,622 and became chairman of the board of directors; in the following years he acquired large additional amounts of stock and received stock options. Eveleigh became vice president, treasurer and a director of Jacobs; he also owned stock and held stock options in Jacobs and assisted Guterma in the operation of Comficor and Chatham Corporation. During 1958, under Guterma's direction, Jacobs acquired all or a controlling interest in a number of other companies. On December 4, 1958, the New York Stock Exchange suspended trading in the stock of Jacobs because of the company's failure to file its annual report for the fiscal year ended July 31, 1958, on October 31, 1958 as required.

The indictment, found on March 16, 1959, contained 21 counts. These can be divided into three categories:

(a) Counts 1-4 and 10-20 charged willful violations of the requirements of §16(a) of the Securities Exchange Act for the filing of so-called insider reports, (Form 4) by officers, directors or beneficial owners of more than 10% of any class of an equity security registered on a national securities exchange within 10 days after the close of any month in which any change in such ownership occurs. Counts 1 and 2 charged failures by Guterma to file reports allegedly required of him as an officer and director of Jacobs for December, 1958, and January, 1959; Counts 3

and 4 charged similar failures by Eveleigh for the same months. Counts 10-20 charged the failure of Comficor, Guterma and Eveleigh to file reports allegedly required from Comficor as a 10% beneficial owner of Jacobs' stock for each month from December, 1957, through July, 1958, and from November, 1958, through January, 1959. Count 4 against Eveleigh was dismissed during the trial with the government's consent.

(b) Counts 5-9 charged violation of the corporate reporting requirements of §13(a) of the Securities Exchange Act. Count 5 charged that Guterma and Eveleigh willfully, knowingly and without just cause hindered, delayed and obstructed the making and filing of Jacobs' annual report (Form 10-K) for the fiscal year ending July 31, 1958, which §13(a) of the Act and SEC Rule X-13A-1 required to be filed with the SEC within 120 days after the close of the fiscal year. Counts 6, 7, 8 and 9 charged that Guterma and Eveleigh willfully, knowingly and without just cause hindered, delayed and obstructed the making and filing of current reports (Form 8-K) which §13(a)(1) of the Act and SEC Rule X-13A-11 allegedly required of Jacobs for September, November and December, 1958 and January, 1959, because of its disposition of a significant amount of assets in each such month. The Court dismissed Counts 6, 7 and 8 for lack of proof of dispositions during the respective months of assets sufficient to require an 8-K report, rejecting the government's contention that transactions in various months could be cumulated to meet the quantitative test in the SEC instructions which we shall discuss below in connection with Count 9.

(c) Count 21 charged all five defendants with conspiring with each other and four other individuals to violate §§ 16, 20 and 32 of the Securities Exchange Act and to "defraud the United States by impeding, impairing, obstructing and attempting to defeat the lawful functions of

an agency of the United States of America, namely, the Securities and Exchange Commission, in the protection of the investing public," by failing to file or obstructing and delaying the filing of the reports previously referred to and by filing reports of Jacobs "which were false and misleading with respect to material facts and which contained omissions of material facts."

The jury found all defendants guilty on all the counts that had been submitted to it. The judge sentenced Guterma to two years on each of Counts 1, 2, 5 and 9, to one year on each of Counts 10 through 20, and to four years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed fines of $10,000 on each of the 16 counts. He sentenced Eveleigh to one year on each of Counts 3, 5, 9 and 10 through 20, and to two years and eleven months on the conspiracy count, the sentences to be served concurrently, and imposed a $10,000 fine on the conspiracy count.

(1) A major contention of appellants relates to the denial of their motion to strike paragraph 7 of the conspiracy count which we set forth in the margin,[1] to the admission of evidence under that paragraph, and to the judge's charge concerning it. The motion to strike was correctly denied. The government had charged a conspiracy not to file re-

[1] "7. It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Comficor, Inc., Chatham Corporation, and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and suoject to primary and contingent liabilities and cause to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co., for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander L. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

quired reports and to defraud the government of the lawful functioning of the SEC for the protection of investors by such failure and by the filing of false and misleading reports, see *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924); it was relevant for the government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public. There is somewhat more in appellants' contention that so much of the trial was devoted to these transactions as to have created a hazard that the jury might be led into thinking that the looting of Jacobs was the substantive offense of which defendants were indicted; although the judge's charge analyzed the evidence on each substantive count, appellants contend that what might otherwise have been the helpful effect of this was nullified by a passage, near the end of the charge, in which the judge dwelt at length on the transactions as to which the government had offered proof under paragraph 7 of the conspiracy count. Indeed, appellants claim this passage enhanced the risk that the jury would convict on all counts for the acts proved under paragraph 7. However, the judge made the bearing of this evidence clear by adding, immediately after the criticized passage, "Considering these matters and others, which you no doubt have in your minds, you must determine if the conspiracy charged existed"; and the only criticism of this portion of the charge made at the time was met in a manner stated to be satisfactory by counsel for Comficor who was the only one to take exception. Moreover, whatever the situation might be in a trial presenting a close issue of fact, the government's case on the conspiracy count and on Count 5, relating to obstructing the filing of the 10-K report, was overwhelmingly established; we are reversing the conviction on Count 9 relating to the failure to file the Form 8-K report for January, 1959; and we see

no basis for belief that the jury did not decide the entirely different issues with respect to the failure to file insider reports on the evidence pertinent to those counts alone.

(2) Another general claim of appellants is that the statutory and regulatory scheme on which the substantive counts are based is so vague and indefinite as to contravene the Fifth and Sixth Amendments when invoked in a criminal prosecution. There is nothing vague or indefinite in the requirement for filing an annual report, and we do not reach the constitutional question with respect to the requirement for filing current reports in view of our reversal of the conviction of this count on another ground. Thus there remain only the attacks on § 16(a) relating to insider reports. These seem to reduce themselves to two. One relates to the phrase requiring a report of "any change in such ownership during such month"; this is asserted to be too vague, at least as applied to the facts here where, in many instances, the "change" occurred through sale by a pledgee. The other, in the case of the Comficor counts, 10-20, related to the phrase "the beneficial owner of more than 10 per centum of any class of any equity security." We find no merit in these contentions; indeed, they border on the frivolous. As said by Chief Justice Hughes in *Sproles* v. *Binford*, 286 U. S. 374, 393 (1932), "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."[2]

[2] Equally without merit is the contention that § 16(a) offends the due process clause of the Fifth Amendment because it does not apply to beneficial owners of, or to officers or directors of issuers of, "an exempted security," which, as defined in § 3(a)(12) includes not only certain defined securities but such others "as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this title which by their terms do not apply to an 'exempted security' or to 'exempted securities.'" See *Yakus* v. *United States*, 321 U. S. 414, 427 (1944).

(3) Reserving other general objections for later discussion, we turn to a review of the substantive counts. Here we can immediately dispose of Count 5, the charge of intentionally delaying the filing of Jacobs' annual report, as to which the proof was so overwhelming and the criticisms of the judge's charge so wholly unmeritorious as to make comment supererogatory.

Count 1, Guterma Form 4 Report, December, 1958: The government supported Count 1 by testimony of Morton Carlin, President of Judson Commercial Corporation, which had made loans to Guterma secured, among other things, by a pledge of Jacobs' stock, that in December, 1958 his company sold 4,600 shares of such stock through a broker; this was not contradicted. The question was whether Guterma knew of the sale. Carlin testified that he was in constant touch with Guterma and Eveleigh and also with Lipton, originally an employee of Guterma, who had become assistant treasurer of Jacobs but continued to keep Guterma's books and handled the details of his loan transactions. The court fairly reviewed this evidence and the defendants' criticisms of the charge are baseless.

Count 2, Guterma Form 4 Report, January, 1959: The government relied on two transactions, a sale of 3,000 shares by Judson Commercial Corporation, and a sale of 20,000 shares by Netherlands Trading Company as trustee for a concern known as UFITEC, these being a portion of 30,000 shares which Guterma had pledged as collateral to UFITEC. If the government had relied solely on the UFITEC sale, we would affirm despite appellants' contention that the sale was unauthorized. Whether it was in fact so may be debatable; but we regard this as immaterial since, the securities being negotiable, the sale effected a change in Guterma's beneficial ownership. Guterma was fully aware of what had occurred, he made no protest until the SEC charged him with failure to report, and the

judge charged, perhaps too favorably to Guterma, that if Guterma honestly believed that the stock had been sold by UFITEC in breach of an agreement, the jury could consider this on the issue of willfulness. However, the two transactions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale. See *United Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 619 (1959). As to the latter, Carlin testified to sales of 3,000 of Guterma's shares in January, 1959; but it was brought out on cross-examination that the proceeds of these sales had been credited not to Guterma but to Comficor and that the error was not corrected until the summer or fall. While other testimony by Carlin could be interpreted as meaning that the facts were accurately shown in statements currently sent to Guterma's office, a sharp issue was created whether Guterma knew in January or February that these 3,000 shares were his, and therefore whether his failure to report the sale was willful within § 32(a). However, the charge omitted any reference to this Comficor complication, the judge denied a request to clarify this, and the prejudice was heightened by the fact that in discussing this count the judge said, "Carlin also testified that Guterma came to the Judson office and was personally told about the sales . . ." which, while correct as a general statement, had been specifically disclaimed as regards any personal conversation with Guterma as to the ownership of the 3,000 shares sold in January. To be sure, there is a certain unreality in supposing that the jury would remember these details from a charge taking nearly a hundred pages of the typewritten transcript; but so long as we observe the rite, we must serve it faithfully.[3]

[3] One is reminded of Judge Frank's remark as to the "unrealistic assumption that the incomprehensible words, uttered in the physical presence of the jurors, have some real effect on their thought processes." Courts on Trial, p. 117.

Appendix B.

Count 3, Eveleigh Form 4 Report, December, 1958: The government introduced a letter dated December 23, 1958 signed by Eveleigh to the Silver Company reciting his delivery of 2,000 shares of Jacobs stock "which I have requested you to sell for my account" and requesting payment of the proceeds, and testimony that Jerry Pressman of the Silver Company on the same day sold the shares and gave Eveleigh a check for the proceeds and that Eveleigh deposited the check in his bank account. Eveleigh countered with evidence that, shortly thereafter, he instructed his bank to transmit a slightly larger amount to another bank for the account of Jacobs. Pressman testified that when Eveleigh did this, Eveleigh remarked to him "Look what I have to do with my money." Any factual issue with respect to this count was fairly put to the jury.

Counts 10-20, Guterma and Eveleigh, Comficor-Form 4 Reports: The convictions on counts 10-20 relating to Comficor's failure to file Form 4 reports raise two general questions, one of law and the other of fact.

The question of law concerns what types of shares are to be considered in determining "any class of any equity security (other than an exempted security) which is registered on a national securities exchange," to which the 10% test of § 16(a) of the Securities Exchange Act is to be applied. Appellants say that all registered shares must be considered, including shares reserved for the exercise of options and for the exercise of conversion rights by preferred stockholders, which had been listed subject to notice of issuance; on that view the "class" would consist of 1,190,036 Jacobs shares. The government contends that only issued shares should be counted, or 882,607 for December, 1957–July, 1958, and 963,107 for November, 1958–January, 1959. In support of this it relies on SEC Rules X-16A-1 and X-16A-2. Rule X-16A-1 provides that "None of the reports provided for in § 16(a) need be made except as

provided in this rule." Rule X-16A-2, entitled "Ownership of More Than 10 Percent of an Equity Security" provides, so far as material,

> "In determining, for the purpose of rule X-16A-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer;"

Section 23(a) empowers the Commission "to make such rules and regulations as may be necessary for the execution of the functions" vested in it, but this, of course, would not permit the Commission to require an insider's report in cases beyond the statute's reach. Appellants claim this is what the SEC has done by Rule X-16A-2, since they read § 16(a) to mean 10% of the registered securities of any class, which, they say, would include securities listed subject to notice of issuance. We disagree with this reading. The phrase "which is registered on a national securities exchange" defines the type of equity security in respect of which insider reports are required, as is plain from the provision in the next clause requiring these reports of a person "who is a director or an officer of the issuer of such security." The question here is what shares are included in the phrase "any class of any equity security." It is hardly to be thought that the shares to which the 10% beneficial ownership test was to be applied should include shares which could not yet be beneficially owned since they had not been issued. Many corporations have registered and listed common shares for the conversion of debentures or preferred stock or the exercise of options, subject to notice of issuance, in amounts approximating the issued shares; appellants' construction would

mean that persons could acquire well over 10% of the outstanding common stock of such a corporation without complying with the reporting requirements of §16(a) and without liability under the short-swing provisions of §16(b). We hold that, in making issued shares the quantum to which the 10% test is to be applied, the SEC acted consistently with the language and purpose of Congress.

The government had difficulty in determining the precise number of Jacobs' shares owned by Comficor during the months for which violations were charged. Controversy rages over two exhibits in which the government summarized its version of the evidence as to the amount of Jacobs' stock held by Comficor during the critical months. The first exhibit, constructed from evidence as to purchases and sales by brokers, showed that Comficor had more than the required 10% in each month. The second exhibit sought to support the first by summarizing evidence as to how much Jacobs' stock was held for Comficor at the end of each month by pledgees and brokers who had not been paid; this met the 10% test except for December, 1958 and January, 1959, when liquidation by the lenders had begun. Appellants criticize the exhibits as including stock that was not Comficor's but belonged to Guterma or others. On the other hand, Lipton testified that Comficor's purchases and sales of Jacobs' stock were entered on its books in a separate account, that the purchase price for the Jacobs shares acquired by Comficor came out of its funds, that a separate account would have been needed if Comficor had bought shares as agent for others, and that there was no such account. The testimony created an issue of fact and the only criticisms of the court's charge on the Comficor counts were sufficiently met. Appellants say the task of weighing the evidence with respect to these complex financial transactions for each of eleven months was beyond the jury's capacity and that the jury perforce gave undue attention to the government's summary exhibits

rather than the testimony that underlay them. However, we find nothing misleading in the exhibits; and it was open to defendants to prepare counter-exhibits embodying their version of the evidence, as they did in connection with Count 9. If defendants chose to avail themselves of their constitutional right to a jury trial, they must take its frailties along with its strengths.

Count 9, Guterma and Eveleigh, Jacobs Form 8-K Report, January, 1959.

Section 13(a) of the Securities Exchange Act requires every issuer of a security registered on a national securities exchange to file "in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to § 12," the latter, containing the registration requirements for securities. Rule X-13A-11 requires every registrant to "file a current report on Form 8-K within ten days after the close of any month during which any of the events specified in that form occurs * * *" Item 2 of the form requires information "if the registrant or any of its majority-owned subsidiaries has acquired or disposed of a significant amount of assets, otherwise than in the ordinary course of business * * *" Instruction 4 defines "a significant amount of assets"; we quote this in the margin.[4]

[4] "4. An acquisition or disposition shall be deemed to involve a significant amount of assets (i) if the net book value of such assets or the amount paid or received therefor upon such acquisition or disposition exceeded 15 percent of the total assets of the registrant and its consolidated subsidiaries, or (ii) if it involved the acquisition or disposition of a business whose gross revenues for its last fiscal year exceeded 15 percent of the aggregate gross revenues of the registrant and its consolidated subsidiaries for the registrant's last fiscal year."

Appendix B.

The transaction claimed to have required the filing of a Form 8-K report by Jacobs for January 1959 was the pledge of all the capital stock and later of $763,000 of bonds and debentures and a promissory note of $2,630,000 of Grand Rapids Metalcraft Corporation, a wholly owned subsidiary, to Inland Credit Corporation, as security for a loan of $150,000. Prior to the Inland Credit loan Jacobs had pledged three promissory notes of Grand Rapids totaling $2,630,000 to James Talcott & Co. along with other collateral as security for certain loans. On January 6, 1959, Jacobs borrowed $150,000 from Inland Credit and pledged as security 34,578½ shares of the stock of Grand Rapids, these being all the issued and outstanding shares. On January 13 Jacobs delivered to Inland Credit additional collateral, to wit, "certain bonds and debentures issued by Grand Rapids Metalcraft Corporation, under its present or prior names, in the aggregate amount of approximately $763,000., and also a demand promissory note of even date made to our order by said Grand Rapids Metalcraft Corporation in the principal sum of $2,630,000 and endorsed by us." Jacobs represented and warranted that it was the sole owner "of all of the said bonds and debentures and that the same are not subject to any claim or lien and that the indebtedness evidenced by the said promissory note is due and owing and has not been assigned, transferred, pledged or paid either in whole or in part."

Appellants' first claim was that the pledge of the $2,630,000 note to Inland was not a disposition of an asset or, at least, not a disposition of the full amount of the note, since the note had already been pledged to Talcott. This was supported by testimony of a Talcott employee that the Talcott loans were not refinanced until February 5, 1959, the date also shown in the financial statements reported, with suitable qualifications, by Ernst & Ernst in November, 1959. Against this the government contended that the war-

ranty made by Jacobs, along with the change in reference from three notes aggregating $2,630,000 to a single note of that amount, showed that the three notes must have been returned by Talcott prior to January 13. Although the most plausible solution of the puzzle may be that Jacobs had Grand Rapids execute a new $2,630,000 note on January 13 in anticipation of the early refinancing of the Talcott loan, the charge fairly put the conflicting evidence to the jury, and the judge was justified in declining to give the further charge that Guterma asked. In any event the issue becomes moot in view of our reversal of the conviction on this count on another ground.

In order to apply the SEC instruction quoted in footnote 3, it is necessary to know "the net book value" of the assets disposed of, the numerator of the fraction, and "the total assets of the registrant and its consolidated subsidiaries," the denominator. The government produced two exhibits with respect to the denominator, one showing the total assets of Jacobs and its consolidated subsidiaries on January 31, 1959 to be $16,147,197 and the other showing these assets to be $17,044,881 as of the same date. Defendants offered an exhibit showing the total assets to be $17,940,502. All these exhibits seem to have been prepared on the basis of including as assets both the parent company's claims against and stock interest in consolidated subsidiaries and the total assets of the subsidiaries themselves, since the audited statements of Jacobs and its consolidated subsidiaries showed assets of only $6,110,533 as of July 31, 1958 and $5,916,207 as of July 31, 1959. While this method of computation produces a totally unrealistic figure, leading, for example, to the seemingly absurd result that a holding company with 25% of its assets in the form of claims against or stock interests in four newly organized consolidated subsidiaries could dispose of any one without having to file a Form 8-K report, at least it squares with

the literal words of the instruction, and, by inflating the denominator, is the construction most favorable to appellants. As to the numerator, the financial reports of Grand Rapids as of January 31, 1959 showed assets of $3,460,788 and liabilities other than stockholders "equity" of $4,874,891, these liabilities including the $2,630,000 of notes and additional long term debt of $763,175 due to Jacobs. The government claimed that the "net book value" of the pledged assets was $2,933,030, more than 15% even on defendants' figure of total assets; apparently this was the sum of two accounts on Jacobs' books, one entitled "notes Receivable," containing a balance of $2,630,000, and another entitled "Investment in Bonds of GRMC," having a balance of $303,030. The government supports this on the view that the numerator and the denominator of the fraction must be determined on a consistent basis. It says that if assets are used without regard to liabilities in computing the denominator, the numerator must be similarly computed, with a deduction of only such reserves, e.g., for depreciation, as would normally appear on the asset side of the balance sheet, and there would be none such with respect to securities. On the other hand, defendants presented a figure of the "net book value" of the pledged collateral as $1,985,607; this was obtained by taking the balances in the same two accounts listed above, then adding two other accounts entitled "Investment Grand Rapids Metalcraft" and "Investment-GRMC" with respective balances of $1,000 and $1,440,217, the latter evidently representing the investment in the stock, and finally deducting the balance, $2,388,640, in an account entitled "Reserve for Operating Losses of Grand Rapids Metalcraft Corporation." Defendants say deduction of the reserve was appropriate in determining the "net book value" of the Grand Rapids securities held by Jacobs. The government itself had introduced exhibits showing the book value of the pledge of the Grand Rapids securities as $1,979,072, a figure quite obviously ob-

tained by deducting the current liabilities of Grand Rapids from its assets as of January 31, 1959, treating the parent company debt as stockholders investment, and disregarding the investment in the stock.

After outlining most of this evidence the trial judge left it to the jury "as the ultimate triers of the facts in this case, to determine what weight, if any, you wish to place on the computations of Mr. Locke and Mr. Doyle [the government's witnesses] on the one hand, and those of Mr. Acker [the defendants' witness] on the other," and thereby determine "whether or not the net book value of the assets pledged constitutes more or less than 15 percent of the total assets of Jacobs and its consolidated subsidiaries." In doing this the judge gave the jury a task properly his own, namely, the interpretation of the term "net book value" in SEC Instruction 4 as applied to a pledge of securities. The conviction on Count 9 must therefore be reversed in any event; however, we think the court should have dismissed this count for failure of proof, at least on the interpretation of "total assets of the registrant and its consolidated subsidiaries" which the government's exhibits themselves adopted. Taking the lowest figure for such assets in any of the exhibits, the government was required to show that the "net book value" of the pledged collateral was some $2,422,000. It is arguable that use of the term "net" negatives reliance on gross figures even as to securities, at least where the facts suggest the gross carrying value of these to be inflated as they do here. To be sure, the figures resulting from applying the book reserve against Jacobs' investment or from treating Grand Rapids' obligations to Jacobs as if they were stock may be criticized as failing to reflect Jacobs' creditor position, although the force of any such criticism is considerably blunted when we learn from the audited financial statements that on February 5, 1959, Jacobs made a capital contribution of $2,190,459 to Grand Rapids "through cancellation of certain of its notes re-

ceivable" and that subsequent to October 15, 1959, the debt of Grand Rapids to Jacobs was subordinated to obligations incurred by Grand Rapids in the ordinary course of business. If defendants were justified in believing that the instruction required something other than a gross figure even for securities on facts such as were here presented, and we cannot say they were not, the government failed to substantiate a net figure meeting the 15% test. There was thus no basis for a finding that the violation of the 8-K reporting requirement, if any there were, was knowing and willful; we therefore do not reach the question whether the SEC's instructions are sufficiently intelligible to support a criminal conviction as a matter of due process.

(4) Relying on *United States* v. *Universal CIT Credit Corp.*, 344 U. S. 218 (1952), Guterma contends it was error for the court to impose separate fines on each substantive count since, as he alleges, the government's case was that the offenses sprang from a single impulse. On no view could *CIT* be reasonably claimed to prohibit separate punishment for the violations of § 16(a) involved in Counts 1 and 10-20, on the one hand, and for the violation of § 13(a) involved in Count 5, on the other. We deem it almost as clear that *CIT* does not preclude separate punishment for Guterma's failure to file a Form 4 report required of him as an officer and director, and his causing Comficor to fail to do so. The issue thus narrows itself down to whether *CIT* forbids separate fines on each of the 10 Comficor counts. We think not. Section 32(a) provides that "Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title" shall upon conviction be fined not more than $10,000, or imprisoned not more than 2 years or both. Section 16(a) requires the filing of reports "within ten days after the close of each calendar month * * *, if

there has been any change in such ownership during such month." To hold that each willful default in filing a monthly report is a separate offense is consistent both with the language of the statute and with the important purpose of achieving the timely filing of current information which Congress considered necessary for the protection of investors. There is no such legislative history here as the Supreme Court found so persuasive with respect to the Fair Labor Standards Act in *CIT*; furthermore changes in beneficial ownership are more discrete and independent than the normal situation with respect to employment at too low wages or too long hours. To such extent as precedents are helpful we find the instant case more analogous to *Ebeling* v. *Morgan*, 237 U. S. 625 (1915), *Badders* v. *United States*, 240 U. S. 391 (1916), and *Blockburger* v. *United States*, 284 U. S. 299 (1932), *see Palmer* v. *United States*, 229 F. 2d 861 (10th Cir. 1955), *cert. denied* 350 U. S. 996 (1956), all upholding separate punishment, than to *CIT*.

(5) Other objections raised by appellants can be briefly treated. There is no substance in the complaint that publicity prevented appellants from receiving a fair trial. Whatever force such a contention might or might not have had if appellants had been tried in the spring of 1959, *see Delaney* v. *United States*, 199 F. 2d 107 (1st Cir. 1952), the publicity had almost ceased by December 7, 1959, when the trial began, the only articles in the New York newspapers during the fall having been one in the World-Telegram on September 7 and two on the financial page of the Journal-American in September and October. Thirty-seven of forty-three veniremen testified they had never heard of any of the defendants and none of the other six sat on the jury. We cannot accept Guterma's claim that his case was so notorious that the veniremen must have been lying; it is a natural failing to believe the public are far more interested in one than they are and Guterma's argument would

have more plausibility if the charge against him had been rape or murder, see *Coppedge* v. *United States*, 272 F. 2d 504, 508 (D. C. Cir. 1959), than the violation of requirements about which few jurors have ever heard or even the looting of a company relatively unknown.

There was no error in the Court's charge as the meaning of "willful" as used in § 32(a), see Herlands, *Criminal Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139, 143-50 (1934). We have examined defendants' arguments as to the government's failure to produce documents in accordance with a pretrial order; we find either that the documents in question were outside the scope of the order or that defendants were not prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested.

Finally we find no merit in Guterma's contention that the court contributed to his decision not to testify by declining to give an advance ruling limiting the extent to which he could be cross-examined on subjects involved in three other indictments, and that this was error. We are not aware of any requirement for such a ruling and Guterma had no reason to suppose objections to cross-examination would not be dealt with properly if he chose to take the stand.

The judgment of conviction is affirmed save as to Counts 2 and 9; the judgment is reversed as to Count 2 and the judgment is reversed and the indictment dismissed as to Count 9.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge
HON. CHARLES E. CLARK,
HON. HENRY J. FRIENDLY,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Alexander L. Guterma, Robert J. Eveleigh,

Defendants-Appellants,

F. L. Jacobs Co., Conficor, Inc., and Chatham Corp.,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to count nine of the indictment as to both appellants, be and it hereby is reversed with directions to dismiss.

Further ordered that the judgment as to count two of the indictment as to appellant Guterma be and it hereby is reversed.

Further ordered that the judgment in all other respects be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

By Niall F. O'Doherty
Chief Deputy Clerk